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No. 82-353

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF LONG BEACH,

Petitioner,

vs.

RICHARD BOZEK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

SUPPLEMENTAL APPENDIX.

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APPENDIX C.

Judgment.

Superior Court of the State of California for the County of Orange.

City of Long Beach; Michael Downs and Dennis Noble, Plaintiffs, vs. Richard Bozek, Defendant. Case No.: 32 50 47.

Filed: December 4, 1980.

The demurrer of defendant, RICHARD BOZEK, against plaintiff, CITY OF LONG BEACH, having come on for hearing on February 15, 1980 at 9:30 A.M., and the Court having reviewed the Notice of Demurrer, Demurrer to Complaint, Points and Authorities in Support Thereof, and Points and Authorities in Opposition to the Demurrer, and having further reviewed the files and papers herein, and having heard argument,

IT IS ORDERED AND ADJUDGED that the demurrer of defendant, RICHARD BOZEK, against plaintiff, CITY OF LONG BEACH, be sustained without leave to amend, and that the matter be dismissed.

DATED: Dec. 4, 1980.

RONALD H. PRENNER
JUDGE

APPENDIX D.

Opinion.

Court of Appeal, Fourth District, Second Division, State of California.

City of Long Beach, Plaintiff and Appellant, v. Richard Bozek, Defendant and Respondent. 4 Civil 23317. (Super.Ct.No. 325047).

Filed: May 5, 1981.

APPEAL from an order of the Superior Court of Orange County. Ronald H. Prenner, Judge. Reversed.

Robert W. Parkin, City Attorney, Robert E. Shannon, Senior Deputy City Attorney, and Thomas A. Vyse, Deputy City Attorney, for Plaintiff and Appellant.

Philip A. Zywiciel for Defendant and Respondent.

Ronald R. Talmo and ACLU Foundation of Southern California by Fred C. Okrand, for Amicus Curiae in support of Respondent.

This appeal presents a question of apparent first impression in California, whether a municipality may maintain an action for malicious prosecution against a person who unsuccessfully sued the city for false arrest and related torts based on a complaint stating facts known by him to be false. Respondent, joined by amicus curiae as to the second, makes two contentions which frame the issues: (1) as a matter of tort law, the remedy of malicious prosecution does not extend to a municipality; and (2) an action against a municipality for false arrest and related torts is absolutely privileged under the First Amendment to the United States Constitution and article I, section 3, of the California Constitution as a petition for redress of grievances. We conclude that the tort of malicious prosecution or malicious civil litigation serves purposes important to the sound administration of justice: (1) discouraging the institution and prosecution of lawsuits maliciously and without probable cause

and (2) indemnifying for the cost of defense those required to defend themselves in such litigation; that those purposes are at least as significant in the case of a municipality as a private litigant; and that, therefore, a municipality may in a proper case maintain a cause of action for malicious prosecution of civil litigation. We further conclude that the constitutional right to petition for redress of grievances does privilege a citizen to file a lawsuit in appropriate circumstances against a governmental agency such as a municipality but that the privilege is qualified, not absolute, and that the institution and maintenance of a suit for false arrest and related torts against a municipality with actual malice and without probable cause is not privileged.

Facts

Respondent Richard Bozek filed an action against the City of Long Beach and two Long Beach police officers for false arrest, assault, battery, false imprisonment and negligent hiring, praying inter alia for general damages of $100,000 and punitive damages of $1,000,000. After a jury trial, judgment was for the defendants.[1]

Bozek's suit having been determined in their favor, City and the officers instituted this action for malicious prosecution.[2] Bozek generally demurred to complaint, and his demurrer was sustained without leave to amend as to the City of Long Beach (City). City appeals.[3]

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[1]Respondent informs us that the verdict of the jury was not unanimous.

[2]The action was instituted in the Los Angeles Superior Court, but upon motion of the defendant the action was transferred to the Orange County Superior Court. There is but a single complaint consisting of but a single count. However, the complaint indicates the City is represented by its city attorney and the officers are represented by other counsel.

[3]The appeal is taken from the order sustaining the general demurrer, a nonappealable order. The notice of appeal is treated as a premature but valid notice of appeal from the judgment of dismissal entered after the notice of appeal was filed. (See Cal. Rules of Court, rule 2(c); *Flowers & Sons Development Corp. v. Municipal Court*, (1978) 86 Cal.App.3d 818, 822, fn. 1.)

DISCUSSION OF CONTENTIONS AND ISSUES

Historically, the recognition of a tort remedy for malicious prosecution of a civil action was the outgrowth of decisions permitting the recovery of damages by an individual for the institution of criminal proceedings against him maliciously and without probable cause. (See Prosser, Law of Torts (4th ed. 1971) § 120, pp. 850-853.) To the extent the tort had its origins in cases involving the wrongful initiation of criminal prosecutions, respondent is certainly correct that recovery by a municipal corporation could not have been contemplated originally. However, we do not agree with respondent that the law still contemplates recovery for malicious prosecution of civil litigation only by an individual.

In support of his argument respondent relies on a portion of the following quotation from the decision in *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50-51: "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees [citations], compensation for injury to his reputation or impairment of his social and business standing in the community [citations], and for mental or emotional distress [citation]. [¶] The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of

already crowded dockets, but by the unscrupulous use of the courts by individuals '. . . as instruments with which to maliciously injure their fellow men.' [Citation.]"

Respondent points to the numerous instances in which the court referred to injury to an "individual" and its statement that recoverable damages include compensation for injury to reputation or impairment of "his social and business standing" and for "mental or emotional distress" as indications by the court that recovery may be had only by an individual. We believe not. The court's use of the word "individual" is undoubtedly explained by the fact that the plaintiff in the case under consideration was an individual, as we suppose is most often the case. Nevertheless, actually the quotation from *Bertero* supports the position of City that a municipality may maintain an action for malicious prosecution of civil litigation.

As pointed out by the court in the quoted language, one of the principal items of damages recoverable in such an action is the plaintiff's reasonable attorney fees in successfully defending the prior action. Indeed, we think there is little question but that in the earliest cases permitting recovery for malicious prosecution of civil litigation, that item of damages was perceived as the real justification for allowing recovery. (See, e.g., *Eastin v. Bank of Stockton* (1884) 66 Cal. 123, 126-127; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 255, pp. 2531-2532; 1 Harper & James, The Law of Torts (1956) § 4.8, p. 327.) While a municipality is incapable of suffering emotional distress and while its legally protected interest in reputation may arguably be very limited or even nonexistent, its right to recoup the public funds expended in defending against suits prosecuted against it maliciously and without probable cause is as important to it, its taxpayers and the public fisc as the

right to indemnity for expenses of defense is to an individual or a private corporation.[4]

Moreover, in the wake of the law explosion, and attendant congested court calendars and in view of the public demand for efficiency and reduction in the cost of government and public concern about the administration of the justice system, deterrence of the initiation and prosecution of wholly groundless lawsuits, identified in *Bertero* as one purpose of the tort of malicious prosecution of civil litigation, is increasingly important. It is our observation that the incidence of suits against municipalities for unlawful arrest and/or the use of excessive force by police officers has increased substantially in recent years. While undoubtedly many such suits are well founded, we think it also true that some are instituted without any real belief in their merit but in the hope of attracting publicity and pressuring the municipality, which may be self-insured as is Long Beach, into paying a sum in settlement irrespective of the real merits of the claim. It may well be, therefore, that the deterrent effect inherent in a rule permitting the maintenance of an action for malicious prosecution of civil litigation would be of special significance in the case of municipalities.

We conclude that important purposes served by the tort are fully applicable in the case of a municipality sued for

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[4]City stated at oral argument that the damages it seeks in this action are the expenses it incurred in defending itself in Bozek's suit against it. The briefs of respondent and amicus appear to assume that City also seeks punitive damages. It is not entirely clear from the complaint whether or not the City meant to claim punitive damages. The prayer includes a request for punitive damages, but it does not specify whether such are sought by all plaintiffs or just the plaintiff police officers (see fn. 2, *ante*). Inasmuch as the demurrer sustained was a general demurrer, the question whether a municipality may recover punitive damages in an action for malicious prosecution of civil litigation in proper circumstances is not a question presented by this appeal, particularly in view of the disclaimer by City at oral argument.

wrongful arrest and related torts maliciously and without probable cause and that such a municipality ought to have the right to maintain an action for malicious prosecution of civil litigation unless constitutional considerations mandate a contrary result.

Respondent and amicus urge that Bozek's suit against the City constituted a petition for redress of grievances protected by the First Amendment to the United States Constitution[5] and article I, section 3 of the California Constitution.[6] We shall assume for purposes of this decision, without deciding the question, that that is so. (Cf. *Matossian v. Fahmie* (1980) 101 Cal.App.3d 128, 134-137; *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting* (1966) 7 Ohio Misc. 64 [217 N.E.2d 712, 717]; also cf. *Stern v. United States Gypsum, Inc.* (7th Cir. 1977) 547 F.2d 1329, 1342-1343, cert. den., 434 U.S. 975 [54 L.Ed.2d 467, 98 S.Ct. 533].)

Next, respondent and amicus point out that the right to petition government for redress of grievances is among the most precious of the liberties guaranteed by the Constitution and shares the preferred place accorded First Amendment freedoms. That is correct. (*Mine Workers v. Illinois Bar Ass'n.* (1967) 389 U.S. 217, 222 [19 L.Ed.2d 426, 430, 88 S.Ct. 353]; *Thomas v. Collins* (1945) 323 U.S. 516, 530

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[5]The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 276-277 [11 L.Ed.2d 686, 704; 84 S.Ct. 710].)

[6]That provision of the California Constitution provides: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."

[89 L.Ed. 430, 440, 65 S.Ct. 315]; *American Civil Liberties Union v. Board of Education* (1961) 55 Cal.2d 167, 178; *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at p. 1342; see also *United States v. Cruikshank* (1876) 92 U.S. 542, 552 [23 L.Ed. 588, 591].)

Building, respondent and amicus next contend that the institution and prosecution of an action against a municipality for false arrest and related torts is privileged. Again, we agree. (Cf. *Sierra Club v. Butz* (N.D.Cal. 1972) 349 F.Supp. 934, 936, 938; *Arlington Hts. Nat. Bank v. Arlington Hts. F. S. & L. A.* (1967) 37 Ill.2d 546 [229 N.E.2d 514, 517].)

Finally, respondent and amicus contend that because of the fundamental nature and preferred position of the right to petition for redress of grievances, the corollary privilege must be and is absolute. With this contention we do not agree.

The plaintiff in a malicious prosecution action bears the heavy burden of pleading and proving that the earlier action was terminated favorably to him, that the earlier action was instituted without probable cause and that it was instituted maliciously. (*Bertero v. National General Corp., supra*, 13 Cal.3d at p. 50, and cases there cited; see 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, §§ 257, 259, 261, pp. 2533-2536.)

In California, "[t]he malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward [the] plaintiff but exists when the proceedings are instituted primarily for an improper purpose. [Citations.] It has been pointed out that the 'principal situations in which . . . civil proceedings are initiated for an improper purpose are those in which (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings

are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' [Citation.]" (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.)

It is alleged in the complaint that "[t]he defendant acted maliciously in bringing the [prior] action against the plaintiffs in that he knew that the allegations contained in said complaint were false and acted with the purpose of annoying and wronging the plaintiffs, and each of them." None of the authorities cited by respondent or by amicus stand for the proposition that a person is privileged to sue a governmental agency when the facts of the claim as set forth in his complaint are known by him to be false. On the contrary, as is frequently stated in the free speech cases, knowing falsehoods do not enjoy constitutional protection. (E.g. *Garrison v. Louisiana* (1964) 379 U.S. 64, 75 [13 L.Ed.2d 125, 133, 85 S.Ct. 209]; *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at p. 1345; see also *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 771 [48 L.Ed.2d 346, 364, 96 S.Ct. 1817].)

In *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting, supra*, 7 Ohio Misc. 64 [217 N.E.2d 712], the defendant had previously filed an action against the Board of Education in an attempt to block its proposed issuance of certain bonds. When that suit was determined in favor of the Board of Education, it filed suit against the plaintiff in the earlier action (Marting) for malicious prosecution of civil litigation. The defendant moved to dismiss the action on the ground that the Board did not have the legal capacity, power or authority to bring such a tort action. Having previously decided to the contrary on demurrer (see *Board of*

Ed. of Miami Trace Local Sch. Dist. v. Marting (C.P. Ohio 1962) 185 N.E.2d 597, 598, 599), the court held that Marting was correct that the Board lacked "legal capacity, power and authority" to maintain the action for malicious prosecution. (7 Ohio Misc. 64 [217 N.E.2d at p. 717]; orig. emphasis deleted.) In discussing the question of whether the Board of Education had legal capacity or authority to prosecute an action for malicious prosecution, the court did point out that the tort of malicious prosecution was originally intended to redress injury to an individual and also observed that "[a]ny judicial construction or statutory provision *prohibiting or unduly restricting* this right [the right of bringing suit against the government agency to challenge its proposed issuance of bonds] would contravene the First and Fourteenth Amendments to the Federal Constitution, . . ." (*Id.*; emphasis added.)

The court also noted that there was no Ohio statute creating any *liability* of a board of education in tort. (7 Ohio Misc. 64 [217 N.E.2d at p. 717].) Amicus here makes a similar observation, that City and its employees are immune from suits for malicious prosecution. (Gov. Code, §§ 815.2(b), 821.6.) Whether the City and its employees are immune from malicious prosecution is irrelevant; it is not City or its employees that are being sued for malicious prosecution. As the court in the last *Marting* case itself observed: "[I]t does not necessarily follow that because a Board of Education has been judicially clothed with the defense of governmental immunity and cannot be sued in tort that it might not sue in tort if a statute so provided." (7 Ohio Misc. 64 [217 N.E.2d at p. 717].)

Government Code section 945 expressly provides that "[a] public entity may sue and be sued." Long Beach is a charter city, and article 4, section 4, of the City of Long Beach Charter gives City "all . . . powers and privileges

. . . which a municipal corporation might or could exercise under the Constitution of the State of California, . . ." We have no doubt whatever that the City of Long Beach has the legal capacity and authority to institute and maintain an action for malicious prosecution in a proper case.

Several of the decisions relied on by respondent and amicus are cases in which a statute was construed as not authorizing a particular proceeding on the basis of the well-established rule that a statute is to be construed in such a way as to avoid constitutional problems. (*Schneider v. Smith* (1968) 390 U.S. 17, 26 [19 L.Ed.2d 799, 806, 88 S.Ct. 682]; *In re Klor* (1966) 64 Cal.2d 816, 821; *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 117; see *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at pp. 1342, 1344; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 81.)

Pena v. Municipal Court, supra, held only that a complaint to the police department asserting misconduct by police officers does not constitute the crime prescribed by Penal Code section 148.5 of reporting to a police officer that a felony or misdemeanor has been committed, knowing such report to be false. (96 Cal.App.3d at p. 83.) Having so held, the court states: "Thus, appellant's more complex constitutional arguments need not be considered." (*Id.*)

Stern v. United States Gypsum, Inc., supra, 547 F.2d 1329, actually supports City's position though it is heavily relied on by respondent and amicus. In that case Stern, an Internal Revenue agent who had been in charge of a corporate audit, instituted suit against the defendants, so far as concerns this case, for conspiracy to prevent plaintiff from performing his duties in violation of the Civil Rights Act (42 U.S.C. § 1985(1)). The conduct of defendants of which the plaintiff complained was their communicating to his superiors in the Internal Revenue Service false and de-

famatory charges of serious professional misconduct. The question before the court was whether or not the defendants' conduct was actionable under 42 U.S.C. section 1985(1). (See 547 F.2d at p. 1342.) Relying on the rule that a court should construe a statute to avoid constitutional doubt (*id.*), the court held "that a § 1985(1) complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from complaints about the plaintiff officer's official performance lodged by the defendants with the officer's superiors." (*Id.*, at p. 1344.)

In discussing the possible constitutional problems, the court made a number of statements that respondent and amicus find useful. However, insofar as it bears upon the case at bench, what the court finally said tends to support the position of City. Discussing Stern's argument "that his complaint alleges that appellants communicated or caused to be communicated their complaints with knowledge of their falsity," the court stated in relevant part: "We are sympathetic to the argument that Stern makes on this point, and we consider this to be a relatively close case for precisely that reason. We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations when knowing falsity is alleged, and although expressing no opinion one way or the other we are not to be understood as implying that Stern's common law theories are unmeritorious. A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended that effect. All that we decide today is that the real if peripheral chill of the right to petition which Stern's knowing falsity rule could engender is significant enough for the First Amendment values to play a part in construing federal legislation which is asserted to provide a separate remedy. And we think that

the sounder path here, on this silent legislative record, is to conclude that Congress did not intend in any way to infringe a taxpayer's right to lodge through the proper channels a complaint about the IRS agent in charge of auditing his tax account." (547 F.2d at pp. 1345-1346.)

Similarly, although it also contains language respondent and amicus find favorable to their position, crucial language in the decision by Judge Zirpoli in *Sierra Club v. Butz, supra*, 349 F.Supp. 934, supports City's position. In that case the Sierra Club filed suit seeking injunctive and declaratory relief that would have had the effect of temporarily prohibiting logging in an area near the Salmon-Trinity Alps Primitive Area. Defendant Humboldt Fir, Inc., filed a counterclaim based on state law tort liability for interference with contractual relations and interference with an advantageous business relationship. It was alleged that the cross-defendants " 'intentionally, willfully, and wrongfully, by oral and written representations, by asserting administrative appeals, by filing the complaint herein and other complaints, and by other acts" sought to induce the United States to breach a contract with Humboldt Fir and to induce the Forest Service to reduce or abandon an announced timber sale program.

The cross-defendants moved to dismiss the counterclaim, and the District Court granted the motion on the ground that the conduct alleged was privileged as a corrolary to the First Amendment right to petition the government for redress of grievances. (349 F.Supp. at p. 939.) In discussing the pertinent United States Supreme Court decisions, particularly *New York Times Co. v. Sullivan, supra*, 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710], and *Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29 [29 L.Ed.2d 296, 91 S.Ct. 1811], Judge Zirpoli stated: "Therefore, in regard to both invasion of privacy and defamation the Court held that if

a speech or writing is a genuine attempt to communicate with others concerning matters of 'public or general interest,' then the Constitution forbids that courts impose sanctions — even civil liability — upon those exercising First Amendment rights. Liability can be imposed only when what appears to be an attempt to discuss matters of public interest is a 'sham' *in that the speaker knows his statements are false or speaks with reckless disregard of whether they are true or false*. Importantly, the Court recently made it absolutely clear that absent this 'sham' use[,] common law 'malice' is irrelevant to a person's right to speak freely without fear of liability. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971)." (349 F.Supp. at p. 937; emphasis added.)

Of course, as pointed out above, the California tort law requires for recovery on a cause of action for malicious prosecution not only that the earlier action was instituted without probable cause but that it was instituted maliciously, and the malice necessary is not some sort of implied malice but a showing that the action was initiated for an improper purpose. (*Albertson v. Raboff, supra*, 46 Cal.2d at p. 383.) And in the case at bench, of course, the allegation of the complaint, taken as true in face of the demurrer, is that Bozek knew that the facts stated in the complaint in his action for false arrest and related torts were untrue. Had those been the facts in *Sierra Club v. Butz*, presumably the decision would have been different.

Matossian v. Fahmie, supra, 101 Cal.App.3d 128, is similarly distinguishable and, carefully read, tends to support the position of City. In that case the plaintiffs had applied to the Department of Alcoholic Beverage Control to transfer their "on sale" liquor license to new premises. The defendants protested to the Department, complaining that granting the transfer would result in or add to undue

concentration of licenses, a recognized ground for denial of an application for transfer. The Department held a hearing, considered the protests and then granted the plaintiffs' application for transfer of the license. Plaintiffs then filed suit for $600,000 damages and costs in three counts sounding in malicious prosecution and tortious interference with business, abuse of process, and conspiracy to prevent competition. The gist of the complaint was that the defendants conspired to and did file " 'meritless protests' " for the single purpose of destroying competition and thereby gaining a business advantage for themselves. (*Id.*, at pp. 134-135.) In the trial court the action was dismissed. On appeal the judgment was affirmed. The court stated its holding as follows: "We are persuaded . . . that where, as here, a statute expressly invites or allows interested persons to protest, or give their views or opinions concerning, proposed or requested governmental administrative action, such persons singly or in combination have a lawful right to do so; in such a case the law will not permit judicial or other inquiry into the persons' purpose or motivation. As said in *Paskle v. Williams*, [(1931)] 214 Cal. 482, 487, 'the motive, even if malicious, of defendants is unimportant *if legal ground existed upon which to predicate' their protests.* . . ." (101 Cal.App.3d at p. 137; orig. emphasis deleted; emphasis added.)

Two observations about *Matossian* are in order. First, insofar as the opinion discloses, the plaintiffs did not allege the defendants knowingly made false statements in their protests to the Board.[7] Second, the court imposed an essential condition on its holding, " 'if legal ground existed

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[7]Even if they had it would appear likely that they would have been absolutely privileged as having been made in the course of an offiical proceeding authorized by law. (Civ. Code, § 47, subd. 2.)

upon which to predicate' their protests." The *Paskle* decision from which the court's partial quotation was taken makes it plain that by a legal ground existing therefor, the court was referring to the existence of probable cause and, we think, also, the existence of a regular and recognizable procedure for the presentation of their protests. (See *Paskle v. Williams, supra*, 214 Cal. at pp. 487-488.)

Next it is urged that constitutional right to petition for redress of grievances ought to give rise to an absolute privilege just as the constitutional right to free speech gives rise to the absolute privilege embodied in California in Civil Code section 47, subdivision 2.[8] We agree that the privilege deriving from the constitutional right to petition for redress of grievances ought to be similar to that deriving from the constitutional right to free speech, but the nature and scope of that privilege is to be found not in Civil Code section 47 but such decisions as *New York Times Co. v. Sullivan, supra*, 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710] and *Rosenbloom v. Metromedia, Inc., supra*, 403 U.S. 29 [29 L.Ed.2d 296, 91 S.Ct. 1811].

The reliance on Civil Code section 47 is entirely misplaced. The privilege there embodied relates to the constitutional right of free speech, if at all, only in a very limited way. Civil Code section 47, subdivision 2 establishes an absolute privilege only for relevant statements made in connection with official proceedings authorized by law. (See

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[8]The statute provides in relevant part: "A privileged publication or broadcast is one made — . . . 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; . . ."

The privilege embodied in Civil Code section 47, subdivision 2 is absolute. (E.g., *Imig v. Ferrar* (1977) 70 Cal.App.3d 48, 55, and cases there cited.)

Hackethal v. Weissbein (1979) 24 Cal.3d 55, 58-60.) The right underlying that privilege is free access to the courts and other judicial, administrative and legislative tribunals. (See *Albertson v. Raboff, supra*, 46 Cal.2d at p. 382.) And Justice Traynor, speaking for the court in *Albertson v. Raboff* clarified both the right underlying the privilege and its relationship to constitutionally protected freedoms, stating: "It may be noted at the outset that the fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." (*Id.*)

The appropriate balance between First Amendment freedoms and state tort law was thoroughly considered and delineated definitively in the landmark decision of *New York Times Co. v. Sullivan, supra*, 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710]. That decision involved a libel action in Alabama by a city commissioner of public affairs against the New York Times for publication of a paid advertisement describing the maltreatment of Negro students protesting segregation. In reversing a judgment in favor of the plaintiff, the Supreme Court held that a state's power to award damages for libel in actions brought by public officials against critics of their official conduct is delimited by the federal constitution and that the First Amendment guarantee of freedom of speech "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

(376 U.S. at pp. 279-280 [11 L.Ed.2d at p. 706, 84 S.Ct. 710]; accord: *Rosenbloom v. Metromedia, Inc., supra*, 403 U.S. at p. 52 [29 L.Ed.2d at pp. 316-317, 91 S.Ct. 1811].)

As already observed, California tort law requires a showing of actual malice to support a recovery for malicious prosecution of civil litigation, and it is alleged in the complaint in the instant case that the defendant knew that the allegations in his complaint in his action against the City for false arrest and related torts were false.

We observe also that while *City of Albany v. Meyer* (1929) 99 Cal.App. 651, held that a municipality could not maintain an action for libel in view of the state Constitution's provision guaranteeing free speech (then art. I, § 9), the court expressly noted that liability might result from *abuse* of the right of free speech. (99 Cal.App. at p. 654.)

Finally, we address the contention of respondent and amicus that recognizing the right of a municipality to sue for malicious prosecution of civil litigation in the circumstances presented by this case would have a constitutionally impermissible "chilling effect" on the exercise of the constitutional right to petition government for redress of grievances. We believe not. Of course, the possibility of a "chilling effect" was discussed in many of the cases already cited (e.g., *Rosenbloom v. Metromedia, Inc., supra*, 403 U.S. at pp. 52-53 [29 L.Ed.2d at p. 317, 91 S.Ct. 1181]; *New York Times Co. v. Sullivan, supra*, 376 U.S. at p. 277-278 [11 L.Ed.2d at p. 705, 84 S.Ct. 710]; *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at pp. 1343, 1345; *Matossian v. Fahmie, supra*, 101 Cal.App.3d at p. 137; *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting, supra*, 217 N.E.2d at p. 717). However, although the potential "chilling effect" was expressly noticed and discussed in *New York Times Co. v. Sullivan, supra* and *Rosenbloom v. Metromedia, Inc., supra*, those are the very cases in which

the United States Supreme Court first adopted and then adhered to the rule that a civil action for damages under state libel law was permissible if actual malice were shown, that is, that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. If the prospect of civil recovery of actual and punitive damages for libel on such a showing was thought not to have an impermissible "chilling effect" on the constitutionally protected right of free speech in those cases, it cannot be said that recognition of City's right to maintain a malicious prosecution action on the facts alleged in the case at bench constitutes such an impermissible "chilling effect."

We also observe the principal element of damages sought by City in this action is its expenses in defending itself in the prior action. (See fn. 4, *ante*.) Under the Civil Rights Act, a plaintiff may be required to pay the defendants reasonable attorney fees in appropriate circumstances (see 42 U.S.C.A. § 1988 (1976); *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412 [54 L.Ed.2d 648, 98 S.Ct. 694]), and that possibility does not appear to have had any noticeable "chilling effect" on the institution of civil rights actions. Of course, it is now settled that a municipality may be a proper party defendant in a civil rights action (*Monell v. New York City Dept. of Soc. Serv.* (1978) 436 U.S. 658, 690-691, 694 [56 L.Ed.2d 611, 635-636, 638, 98 S.Ct.

2018]), and in appropriate circumstances could undoubtedly recover its attorney fees from an unsuccessful plaintiff. (42 U.S.C.A. § 1988 (1976).)

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

KAUFMAN
J.

We concur:

GARDNER
P.J.

MCDANIEL
J.